Post 8/6/67

Right of Privacy

Attorney General Clark's sweeping directives to all Federal agencies forbidding all wiretapping and bugging can serve as an excellent bridge to the proposed Right of Privacy Act of 1967 recommended by President Johnson to the Congress. It is devoutly to be hoped that a statute will emerge barring all eavesdropping, whether by wiretapping or bugging, whether by private persons or public officials.

The inviolability of private communication is more than ever of supreme importance in our society. An expedient to facilitate crime detection may not become a consideration exclusive of all other considerations. The social need for law enforcement must not be permitted to overwhelm the rights of citizens. Our American way of life is based on the confidence of the citizen in his government.

In a democracy, we are concerned primarily with the relation of the individual to his government—a just government. And the maintenance of this over-all relationship has greater importance than the isolated search for fact—or even justice—in any specific case. We have, in the words of Professor Edmund Cahn, put a "ceiling price on truth" in a legal proceeding as in the Fifth Amendment.

We should proceed to do so now in this context; for wiretapping and bugging constitute the greatest conceivable invasion of privacy. Hence, in any new legislation, there should be no exception whatsoever to their employment — save perhaps only in the single instance of national security and then only under the most rigid judicial supervision and control.

Empirically it has been demonstrated that unless prohibition is absolute, inroads on proscriptive enactments inevitably will be made. Such has been the experience in connection with Section 605 of the Federal Communications Act, enacted in 1934, which undertook to prohibit the interception and divulgence of telephone calls.

In 1937 the Supreme Court ruled that the law applied to law enforcement officers as well as private citizens. Yet in 1941 the Attorney General held that a violation required interception and divulgence outside the Government and that Government agents, therefore, could wiretap so long as the information was not divulged in the courts. This strained and devious construction vitiated Section 605.

Not only did it open the door to Federal law enforcement tapping but the Justice Department felt constrained not to prosecute state and local officers even when they have flagrantly persisted in violating the law to this very day—despite the high court's decision that the Federal law applied to the states. Still worse, this same attitude affected the prosecution of private wiretappers so that only a handful has been brought to court during three decades.

This wiretap policy has also had a meretricious effect on bugging and other forms of electronic snooping where there has been no Federal statutory law. By all accounts these practices are far more widespread than wiretapping and involve an even deeper penetration into privacy. Despite their sharply restricted uses by the decisional law of the Supreme Court, they have been employed by Federal and state agencies—in the latter case under statutory authorization. That of New York has just been declared unconstitutional (Berger v. New York).

All eavesdropping by any person, including enforcement and prosecuting officers, should be prohibited (with the lone exception already indicated). The recent rulings by the Attorney General should be scrupulously observed until the new statute is enacted. Its scope should be extended so far as constitutional competence permits to state officers. In the case of wiretapping the decisions of the Supreme Court (Weiss v. U.S. and U.S. v. Benanti) render it clear that this can be done—in the case of bugging areas of prohibition to the states can be reached by appropriate constitutional predicates such as the Commerce Act. Where state action remains unaffected by Federal legislation or decisional law, the states themselves should take prompt action to supplement the congressional enactment.

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